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3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5
6 UNITED STATES OF AMERICA,

Case No. 3:17-cr-00054-HDM-VPC
Case No. 3:20-cv-00359-HDM

7 Plaintiff,

v.

8 ANTHONY CHARLES GRAY,

9 ORDER

Defendant.

10 Before the court is defendant Anthony Gray's motion to vacate
11 pursuant to 28 U.S.C. § 2255 (ECF No. 68). The government has
12 responded (ECF No. 70), and Gray has replied (ECF No. 71).

13 On July 12, 2017, Gray was charged by way of indictment with
14 one count of felon in possession of a firearm in violation of 18
15 U.S.C. § 922(g). (ECF No. 1). Pursuant to an agreement, Gray
16 entered a plea of guilty to the charge. (ECF Nos. 41 & 43). The
17 court thereafter sentenced Gray to 63 months in prison. (ECF Nos.
18 49 & 50).

19 Section 922(g) prohibits the possession of a firearm by
20 several categories of persons, including any person who has been
21 convicted in any court of a crime punishable by a term of more
22 than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his
23 conviction, Gray had prior felony convictions for discharging a
24 firearm from a vehicle and for possession of a firearm with an
25 obliterated serial number for which he was sentenced to concurrent
26 terms of 26 to 120 months and 12 to 24 months, respectively. When
27 Gray was charged and entered his plea in this case, the government
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1 was not required to prove that he knew he was a felon. *United
2 States v. Enslin*, 327 F.3d 788, 798 (9th Cir. 2003). But after
3 Gray was sentenced, the U.S. Supreme Court concluded that a
4 defendant may be convicted under § 922(g) only if the government
5 proves that the defendant "knew he belonged to the relevant
6 category of persons barred from possessing a firearm." *Rehaif v.
7 United States*, 139 S. Ct. 2191, 2200 (2019). On the basis of *Rehaif*
8 and the government's failure to charge his knowledge of status,
9 Gray now moves to vacate his conviction.

10 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
11 vacate, set aside, or correct his sentence if: (1) the sentence
12 was imposed in violation of the Constitution or laws of the United
13 States; (2) the court was without jurisdiction to impose the
14 sentence; (3) the sentence was in excess of the maximum authorized
15 by law; or (4) the sentence is otherwise subject to collateral
16 attack. *Id.* § 2255(a).

17 Gray argues that the omission of the *Rehaif* element from the
18 indictment violated his Fifth Amendment rights guaranteeing that
19 a grand jury find probable cause to support all the necessary
20 elements of the crime and to not be tried on a fatally defective
21 indictment and his Sixth Amendment rights to notice of the charges.
22 He also alleges that the defective indictment deprived the court
23 of jurisdiction. The government asserts that Gray has waived his
24 right to bring these claims, that his claims are procedurally
25 defaulted, and that the government is not required to prove the
26 defendant knew his possession of firearms was unlawful.

27 Gray entered a conditional guilty plea that allowed him to
28 appeal the denial of his motion to suppress and any sentence above

1 the Guidelines range. However, he "knowingly and expressly
 2 waive[d]" all other direct appeal rights as well as "all collateral
 3 challenges, including any claims under 28 U.S.C. § 2255, to his
 4 conviction, sentence, and the procedure by which the Court
 5 adjudicated guilt and imposed sentence, except non-waivable claims
 6 of ineffective assistance of counsel." (ECF No. 41 at 10-11).

7 "An unconditional guilty plea waives all non-jurisdictional
 8 defenses and cures all antecedent constitutional defects, allowing
 9 only an attack on the voluntary and intelligent character of the
 10 plea." *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir.
 11 2013); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973);
 12 *United States v. Espinoza*, 816 Fed. App'x 82, 85 (9th Cir. June 1,
 13 2020) (unpublished disposition) (unconditional plea waiver
 14 precludes all Fifth and Sixth Amendment claims except to the extent
 15 they contest the court's jurisdiction or the voluntariness of the
 16 plea). Thus, except to the extent Gray attacks the jurisdiction of
 17 the court,¹ his claims are waived.²

18 Gray's jurisdictional argument is without merit. The omission
 19 of an element from the indictment does not affect the court's
 20 jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002);
 21 *United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir. 2003);
 22 see also *United States v. Jackson*, 2020 WL 7624842, at *1 (9th
 23 Cir. Dec. 22, 2020) (unpublished disposition) (rejecting the
 24 defendant's argument that omission of the Rehaif element deprived

25 ¹ Gray does not attack the voluntariness of his plea.

26 ² The court agrees with the well-reasoned opinions of several
 27 courts that none of the exceptions under *Tollett* to the collateral
 28 challenge waiver applies in this case. See, e.g., *United States v. Kelbch*, 2021 WL 96242, at *2 (D. Nev. Jan. 7, 2021).

1 the district court of jurisdiction); *United States v. Burleson*,
 2 2020 WL 4218317, at *1 (July 23, 2020) (unpublished disposition)
 3 (same); *Espinoza*, 2020 WL 2844542, at *1 (same); *United States v.*
 4 *Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Balde*, 943 F.3d 73, 88-92 (2d Cir. 2019); *United States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019). Cf. *United States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission of *Rehaif* element from indictment for plain error).

10 Moreover, to the extent they are not otherwise waived, Gray's
 11 claims are procedurally defaulted.

12 "If a criminal defendant could have raised a claim of error
 13 on direct appeal but nonetheless failed to do so, he must
 14 demonstrate" either "cause excusing his procedural default, and
 15 actual prejudice resulting from the claim of error," *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is
 16 actually innocent of the offense, *Bousley v. United States*, 523 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal
 17 ordinarily requires a showing of some external impediment
 18 preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires
 19 the petitioner to establish 'not merely that the errors at ...
 20 trial created a possibility of prejudice, but that they worked to
 21 his actual and substantial disadvantage, infecting his entire
 22 trial with error of constitutional dimensions.'" *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation
 23 omitted).
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1 Gray could have raised his claims on direct appeal but did
2 not do so. They are therefore procedurally defaulted. It is
3 unnecessary to resolve whether Gray can demonstrate cause for the
4 default, because even if he could, he cannot demonstrate
5 prejudice.³

6 Gray committed the instant offense after receiving a two- to
7 ten-year sentence for discharging a firearm from a vehicle and a
8 one- to two-year sentence for possession of a firearm with an
9 obliterated serial number. (PSR ¶ 37). Further, Gray acknowledged
10 in his plea agreement that he had been previously convicted of a
11 felony. (ECF No. 41 at 3-4). Finally, and most importantly, Gray
12 acknowledged during his plea colloquy both that he had a prior
13 felony conviction -- specifically, for discharging a weapon from
14 a vehicle -- and that he was aware at the time of his offense that
15 he was not allowed to possess a firearm. (ECF No. 60 (Tr. 21)). In
16 light of Gray's admissions that he knew he was a convicted felon
17 and that he was prohibited from possessing firearms, combined with
18 his criminal history, the court is not persuaded that the outcome
19 of the proceedings would have been any different had the grand
20 jury been presented with, and the indictment had alleged, the
21 *Rehaif* element. He thus suffered no prejudice from the omission of
22 the *Rehaif* element.

23 Gray argues that he suffered prejudice because he was
24 convicted by a court lacking jurisdiction. For the reasons
25 previously discussed, this argument is without merit because the
26 errors Gray complains of did not deprive the court of jurisdiction.

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28³ Gray does not argue actual innocence.

1 Gray alternatively argues that he is not required to
2 demonstrate prejudice to obtain relief because the omission is
3 structural error.

4 "[C]ertain errors, termed structural errors, might affect
5 substantial rights regardless of their actual impact on an
6 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263
7 (2010) (internal punctuation and citations omitted). Thus,
8 structural error "warrant[s] habeas relief without a showing of
9 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-
10 64 (9th Cir. 2011). "But structural errors are a very limited class
11 of errors that affect the framework within which the trial
12 proceeds, such that it is often difficult to assess the effect of
13 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and
14 citations omitted). Cases in which the Supreme Court has found
15 structural error include total deprivation of counsel, lack of an
16 impartial trial judge, violation of the right to a public trial
17 and an erroneous reasonable-doubt instruction. *See id.* (discussing
18 cases). In contrast, errors that have been found to be non-
19 structural include where the court instructed on an invalid
20 alternative theory of guilt, gave an instruction omitting an
21 element of the offense, or erroneously instructed the jury on an
22 element. *Id.* at 264 (discussing cases).

23 The Ninth Circuit has not yet addressed in a published opinion
24 whether omission of the *Rehaif* element from the indictment is
25 structural error. But it has held that the error is not structural
26 in at least one unpublished decision. *See United States v. Jackson*,
27 2020 WL 7624842, at *1 n.1 (9th Cir. Dec. 22, 2020). And the First,
28 Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded

1 that *Rehaif* errors are not structural. *United States v. Patrone*,
 2 985 F.3d 81, 86 (1st Cir. 2021); *United States v. Nasir*, 982 F.3d.
 3 144, 171 n.30 (3d Cir. Dec. 1, 2020); *United States v. Lavalais*,
 4 960 F.3d 180, 187 (5th Cir. 2020); *United States v. Payne*, 964
 5 F.3d 652, 657 (7th Cir. 2020); *United States v. Coleman*,
 6 961 F.3d 1024, 1030 (8th Cir. 2020); *United States v. Trujillo*, 960 F.3d
 7 1196, 1207 (10th Cir. 2020); see also *United States v. Hill*, 2020
 8 WL 7258551, at *2 n.3 (3d Cir. Dec. 10, 2020) (unpublished
 9 disposition); *United States v. Watson*, 820 Fed. App'x 397, 400
 10 (6th Cir. 2020) (unpublished disposition). But see *United States*
 11 v. *Gary*, 954 F.3d 194, 206 (4th Cir. 2020). This court agrees with
 12 the well-reasoned opinions of these courts and concludes that a
 13 *Rehaif* error does not fall within the limited class of errors the
 14 Supreme Court has found to be structural.⁴

15 Finally, Gray argues that *Rehaif* requires the government to
 16 prove not only that he knew that he was a convicted felon but also
 17 that he knew he was barred from possessing firearms.
 18 Notwithstanding the fact that Gray admitted to the court that he
 19 knew he was barred from possessing a firearm, Gray's legal argument
 20 is also without merit. *United States v. Singh*, 979 F.3d 697, 727
 21 (9th Cir. 2020) ("[The defendant] contends that *Rehaif* requires
 22 the Government to prove he knew not only his status, but also that

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 24 ⁴ While there is some case law holding that defects in the
 25 indictment are structural error, those cases apply only where the
 26 claim is timely raised. See, e.g., *United States v. Du Bo*, 186
 27 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) ("We hold that, if
 28 properly challenged prior to trial, an indictment's complete
 failure to recite an essential element of the charged offense is
 not a minor or technical flaw subject to harmless error analysis,
 but a fatal flaw requiring dismissal of the indictment. . . .
 Untimely challenges to the sufficiency of an indictment are
 reviewed under a more liberal standard.").

1 he knew his status prohibited him from owning a firearm. But this
2 interpretation is not supported by *Rehaif . . .*).

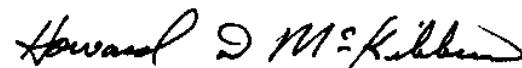
3 Accordingly, because the claims raised in Gray's § 2255 motion
4 are waived, procedurally defaulted and/or without merit, IT IS
5 THEREFORE ORDERED that the motion to vacate, set aside or correct
6 sentence (ECF No. 68) is hereby DENIED.

7 IT IS FURTHER ORDERED that Gray is DENIED a certificate of
8 appealability, as jurists of reason would not find the court's
9 denial of the motion to be debatable or wrong.

10 The Clerk of Court shall enter final judgment accordingly.

11 IT IS SO ORDERED.

12 DATED: This 17th day of March, 2021.

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15 UNITED STATES DISTRICT JUDGE
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